

Advance Machine Co., the United States District Court of Minnesota held that a Consumer Protection Safety Act (CPSA) reporting requirement was a continuing violation statutory provision for statute of limitations purposes. 547 F.Supp. 1085 (D.C. Minn. 1982). In the second case, which was an EPA administrative decision, the Administrative Law Judge, relying in part on Advance Machine, held that a TSCA section 8(e) violation was a continuing one and therefore the general statute of limitations was tolled.²⁸

In Advance Machine, the United States sought civil penalties from defendant Advance Machine Co. (Advance Machine) for allegedly failing to inform the Consumer Products Safety Commission of substantial product hazard information, as required under section 15(b) of the CPSA. The government filed the complaint approximately eight years after defendant's first date of violative conduct on February 19, 1982; however, the complaint was filed less than five years after the Commission had actual knowledge of the substantial product hazard information. As in this case, Advance Machine argued that the United States' claim was time-barred by 28 U.S.C. § 2462.

The district court considered the CPSA's reporting requirement at section 15(b), which contains nearly identical language to section 8(e) of TSCA.²⁹ The court found that section 15(b)

However, the holding in 3M Co. would not impact their outcome today because the 3M Co. court ruled only on whether the discovery rule applies in that case, and not on the application of the continuing violation doctrine.

²⁸ Courts have considered the applicability of the doctrine of continuing violations to other environmental statutes, such as the Clean Air Act and the Clean Water Act; however, as noted above, the application of the continuing violations doctrine depends, in large part, on the general purpose of the specific statute and statutory provision at issue. Harmon, 7 E.A.D. at 29 (citing Crown Coat Front Co., 386 U.S. 503, 517 (1967) (the inquiry into when a cause of action first accrues is answered on a case-by-case basis "in the light of the general purposes of the [underlying] statute of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.") (quoting Reading Co. v. Koons, 271 U.S. 58, 62 (1926))). Because the CAA and CWA cases in which courts have examined the applicability of the continuing violations doctrine address violations specific to the CAA and CWA, a full discussion of these cases would not further this tribunal's consideration of the applicability of the doctrine in the instant case. Therefore, the EAB's Harmon decision and importantly its progeny are controlling for determining the applicability of the doctrine of continuing violations to TSCA section 8(e). This is the first time since Harmon established the continuing violation test that a court will decide whether a TSCA section 8(e) violation is a continuing violation.

²⁹ Section 15(b) of the CPSA states:

“explicitly sets forth the duty to report as continuing unless the manufacturer has actual knowledge that the Commission is adequately informed.” Advance Machine, 547 F.Supp. at 1091. The court determined that “a cause of action for violation of section 2064(b) first accrues upon the manufacturer’s failure to file a timely report after learning of a defect. As this is a continuing duty, however, the statute of limitations does not start running until a report is filed or the manufacturer acquires actual knowledge that the Commission is adequately informed.” Id. Thus, the court concluded that the complaint was not time-barred under 28 U.S.C. § 2462, given that the Consumer Products Safety Commission had actual knowledge within the statute of limitations period.

In reaching this conclusion, the court in Advance Machine analyzed the statutory language of the CPSA and legislative intent. The court was persuaded that the plain language of section 15(b) of the CPSA imposes a continuing duty to inform, noting that where the “wording of the statute is plain, simple, and straightforward, the words employed must be accorded their normal meaning Moreover, statutes protecting the public health and safety are to be construed liberally.” Id. at 1089 (citing Kananen v. Matthews, 55 F.2d 667, 670 (8th Cir.), cert. denied, 434 U.S. 939, (1977); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)). In addition, the court found that the purpose of CPSA section 15(b), which is strikingly similar to the purpose of section 8(e) of TSCA, is to ensure substantial hazard information is reported in a timely manner to enable the Commission to act “swiftly” to protect the public. Id. at 1090. The court astutely observed that if the continuing violations doctrine were not applicable for purposes of tolling the statute of limitations, the purpose of the statutory provision “would be frustrated since a

Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product who obtains information which reasonably supports the conclusion that such product (1) fails to comply with an applicable consumer product safety rule; or (2) contains a defect which could create a substantial product hazard described in subsection (a)(2) shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.
15 U.S.C. § 2064(b) (emphasis added).

manufacturer could violate the reporting requirement without fear of punishment if it could successfully hide the evidence of the product defect from the Commission for five years. A manufacturers' incentive would thus be to obfuscate rather than to inform." *Id.* at 1090.

The Advance Machine court's reasoning and logic applies with equal force to the instant case. In a close parallel to the CPSA reporting requirement, TSCA section 8(e) imposes a statutory duty to *immediately* inform the Administrator. That duty begins when a person obtains reportable information "which reasonably supports the conclusion that [a chemical] . . . substance or mixture presents a substantial risk of injury to health or the environment" and continues *unless* that person either has informed the Administrator of the information or has actual knowledge the Administrator has been adequately informed of the information.³⁰ 15 U.S.C. § 2607(e). Similarly, CPSA section 15(b) imposes a statutory duty to *immediately* inform the Commission. That duty starts when a person obtains reportable information pertaining to substantial product hazards and continues *unless* that person either has informed the Commission or has actual knowledge that the Commission has been adequately informed of the information. 15 U.S.C. § 2064(b). The court's rationale in Advance Machine clearly bolsters the Agency's position that section 8(e) violations are continuing in nature.

The second case, In the Matter of Union Carbide Corporation, is a TSCA section 8(e) administrative case that directly considered the statute of limitations issue. Docket No. TSCA-85-H-02, 1985 EPA ALJ LEXIS 13 (October 3, 1985). The Administrative Law Judge did not have the benefit of the EAB's analytical framework in Harmon for determining whether the section 8(e) violation was a continuing one for statute of limitations purposes. However, in

³⁰ Importantly, the court in Advance Machine rejected defendant's argument that the duty to immediately inform the Consumer Products Safety Commission expires twenty-four hours after the company obtained the CPSA section 15(b)-reportable information based on the Agency's regulation at 16 C.F.R. § 1115.14(c) requiring submission within twenty-four hours. The court reasoned that the Commission's implementing regulation is simply guidance to manufacturers, and to read the time frame as extinguishing a mandatory statutory duty would run "contrary to the last clause of section 2064(b) and the purposes of the Act." Advance Machine, 547 F.Supp. at 1090.

applying similar logic employed later by the EAB later in Harmon and its progeny, the Administrative Law Judge concluded that the Agency's actions were not time-barred under the general federal five-year statute of limitations because the violations under TSCA section 8(e) were continuing violations.³¹ In facts highly analogous to the instant case, Union Carbide Corp. obtained substantial risk information on September 16, 1977, but failed to inform EPA of this information until September 26, 1983, after the Agency specifically requested the information from the company on August 5, 1983. Union Carbide Corp. at 4-7. EPA filed the complaint alleging violations of TSCA section 8(e) more than seven years after Union Carbide Corp. first obtained the information. Importantly, the Administrative Law Judge held, relying upon Advance Machine, that the statute of limitations for TSCA section 8(e) violations begins to run on the last day of the violative conduct. Id. at 10-13.

V. CONCLUSION

EPA has properly pleaded its case by stating a claim upon which relief may be granted, and the Agency has timely filed the Complaint well within the applicable statute of limitations. Respondent violated TSCA section 8(e), which is a continuing violation statutory provision. In this case, Elementis' violative conduct began in 2002 and continued every day thereafter until 2008. Respondent should not be permitted to escape TSCA's pecuniary sanctions as a consequence of shirking its section 8(e) mandatory duty to inform the Administrator, by delaying the submission of substantial risk information about hexavalent chromium, a known carcinogen, for nearly six years. Any concerns about staleness "are much less compelling when a violative course of conduct that began in the past continues unabated into the five-year period immediately preceding the filing of the complaint." Lazarus, 7 E.A.D. at 366 (citing United States v. Winnie,

³¹ At the time of this decision it had *not* been established that 28 U.S.C. § 2462 was the applicable statute of limitations for administrative complaints, as distinguished from judicial proceedings to assess a penalty or enforce an administratively imposed penalty. However, the Administrative Law Judge assumed for purposes of argument that 28 U.S.C. § 2462 applied and concluded it did not bar the proceeding. Union Carbide Corp. at 8.